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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NUMBER 78-1009

ECONOMY CARPETS MANUFACTURERS & DISTRIBUTORS, INC.,

Petitioner

Versus

BETTER BUSINESS BUREAU OF BATON ROUGE AREA, INC. and ST. PAUL FIRE AND MARINE INSURANCE CO.,

Respondents

OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

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SUBJECT INDEX

Page

I. TABLE OF CASES ii

II. ARGUMENT

I. *It is a finding of fact that statements made by the BBB were truthful, constitute opinion, and that Petitioner corporation made itself a matter of public concern* 3

II. *Economy Carpets Manufacturers and Distributors, Inc. was a public figure and was required to prove actual malice under the New York Times and Gertz decisions of this Court* 6

III. *Expressions of opinion about public figures made without knowing or reckless falsity are privileged under the First Amendment of the United States Constitution* 9

IV. *The Times - Gertz privileges are not restricted to corporations in the business of communications and are based, at least in part, on the First Amendment's protection of public discussion and the dissemination of information and ideas* 11

III. CONCLUSION 15

CERTIFICATE 16

TABLE OF AUTHORITIES

Page

CASES

Economy Carpets Manufacturers and Distributors, Inc. v. Better Business Bureau of Baton Rouge Area, Inc. and St. Paul Fire and Marine Insurance Company, 361 So.2d 234 (La. App., 1st Cir., 1978) 4, 5, 7, 8, 13, 14

First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) 12, 13

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 789 (1974) 2, 6, 7, 10

Mashburn v. Collin, 355 So.2d 879 (La., 1977) 9, 10, 11

New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) 2, 6, 10

Sprouse v. Clay Communications, Inc., ____ W. Va.____, 211 S.E.2d 674, Certiorari Denied, 423 U.S. 882, 96 S.Ct. 145, 46 L.Ed.2d 107 (1975) 11

OTHER

Louisiana Constitution of 1974, Article V, Section 10 3

Robertson, "Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.", 54 Texas L.Rev. 199 (1976) 5, 9

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STATEMENT OF THE CASE

Although Petitioner's Statement of the Case is generally correct, it goes beyond the bounds of fact and strays into the area of argument.

The issue of the correctness of the jury charge was never reached by the Court of Appeal. The statement on Page 11 of Petitioner's Brief that "On the defamation count, the jury were properly instructed by the trial judge according to requirements laid down for defamation suits by private plain-

tiffs in *Gertz* . . ." is, and has always, been seriously questioned by Respondents.

Further statements which are not factual but argumentative are:

(1) "Without specifying in what particulars the jury might have misunderstood the instructions given at the first trial, and without finding that the jury award was supported by no evidence or against the great weight of the evidence, the trial judge reduced the award to Thirty Thousand Dollars ($30,000) . . ." P. 12 of Petition.

(2) "The Court of Appeal's sole basis for rendering judgment for defendants was an interpretation of the decisions of this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)." P. 12a of Petition.

(3) "Having concluded that the BBB 'Special Bulletin' consisted of statements of opinion, rather than fact, the Court of Appeal determined that plaintiffs could not prove knowledge of falsity or reckless disregard of the truth. The court did not in fact address that issue at all, but, as explained more fully in Point III of this Petition, instead ventured only a cursory inquiry into the presence of common-law 'malice'." P. 19 of Petition.

This is not intended as an exclusive listing of arguments rather than facts. It is an effort to have this Court separate fact from argument in Petitioner's Statement of the Case After the Court has read the Appendices to Economy's Petition — the Trial Court Opinion on the issue of Quantum and the Court of Appeal Opinion — it will be able to judge for itself the facts found by the Trial Court and the Court of Appeal ind discern the law applied by both.

I.

IT IS A FINDING OF FACT THAT STATEMENTS MADE BY THE BBB WERE TRUTHFUL, CONSTITUTE OPINION, AND THAT PETITIONER CORPORATION MADE ITSELF A MATTER OF PUBLIC CONCERN.

Petitioner's Reason Number II why a writ should be granted herein does not present an issue of law. It is nothing more than argument to persuade this Court to change factual findings.

The Constitution of the State of Louisiana adopted in 1974, provides for the scope of review of the Courts of Appeal (intermediate appellate courts) of Louisiana to include factual determinations:

"Article V.

Section 10. (A) Jurisdiction. Except in cases appealable to the supreme court and except as otherwise provided by this constitution, a court of appeal has appellate jurisdiction of all (1) civil matters decided within its circuit and (2) matters appealed from family and juvenile courts, except criminal prosecutions of persons other than juveniles. It has supervisory jurisdiction over cases in which an appeal would lie to it.

(B) Scope of Review. Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts." (Louisiana Constitution of 1974).

Pursuant to this state constitutional mandate, the First Circuit, Court of Appeal, made factual findings, of which Petitioner complains.

It is a specific finding of fact by the First Circuit Court of Appeal that:

> "Employing the foregoing guidelines, we find that much of the text of the Special Bulletin, as well as the impressions and implications which may be drawn therefrom, constitutes opinion." 361 So.2d 234, 240; (Petitioner's Appendix - P. 90-91).

The Court further found as a fact that each statement contained in the publication referring to Petitioner was true and did not imply illegal or immoral conduct:

> "Both witnesses considered each sentence of the article individually and on the basis of their own knowledge and actions and the testimony of other witnesses proved the truth of each separate statement standing alone. The more difficult question is whether the factual statements imply or insinuate illegal or immoral conduct on the part of Economy, which insinuations or implications were not true. *We do not find this to be the case.*"
> (Emphasis supplied). 361 So.2d 234, 241.
> (Petitioner's Appendix - P. 91-92).

An additional finding of fact is that the subject matter of the bulletin is a matter of public concern and, therefore, Petitioner is a public figure.

> "Is the subject matter of the bulletin a matter of public concern? The information was provided with regard to a merchant who engaged in extensive advertising in the news media with the object of attracting prospective purchasers and customers to his establishment and thereby increasing his sales and profit. *We find a business enterprise so conducted is a matter of public concern and interest . . .*"
> (Emphasis supplied). 361 So.2d 234, 242.
> (Petitioner's Appendix - P. 95).

It is an additional finding of fact that the expressions of the bulletin were not made with malice, but to inform:

> "Were the expressions in the bulletin malicious, meaning were they knowingly false or made with reckless disregard as to their truth or falsity? . . . On the contrary, the proof preponderates overwhelmingly in favor of the conclusion that the bulletin was issued solely to make available to BBB members and consumers the information which the BBB had developed concerning Economy in order to promote knowledgeable dealing with Economy by prospective' purchases of carpeting. This finding of fact does not require our finding of manifest jury error herein."
> 261 So.2d 234, 241.
> (Petitioner's Appendix - P. 93-94).

A court of competent jurisdiction with scope of review including factual matters has found factually that petitioner is a public figure, the bulletin constitutes opinion drawn from truthful, non-malicious statements which do not imply or insinuate illegal or immoral conduct on the part of petitioner. The scope of review of the Court of Appeal is not complained of and, in concept, the type of factual findings made by the appellate court is embraced by a co-author of petitioner's brief. See Robertson, "Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.", 54 Texas L.Rev. 199 (1976) at Pages 249 and 250.

Petitioner's Reason Number II for granting the writ presents no legal issue to this Court.

II.

ECONOMY CARPETS MANUFACTURERS AND DISTRIBUTORS, INC. WAS A PUBLIC FIGURE AND WAS REQUIRED TO PROVE ACTUAL MALICE UNDER THE NEW YORK TIMES AND GERTZ DECISIONS OF THIS COURT.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974), this Court stated:

> "The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. Despite this [substantial] abridgement of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. New York Times Co. v. Sullivan, *supra;* Curtis Publishing Co. v. Butts, *supra.* We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from

> liability. Rather, we believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons."

This Court went on to define a public figure as follows:

> "Respondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.
>
> . . . We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."

In applying these standards in the instant case, the Louisiana Court of Appeal, First Circuit, (361 So.2d 234, 242) (La.App., 1st Cir., 1978), found Economy a "public figure":

> "Is the subject matter of the bulletin a matter of public concern? The information was provided with regard to a merchant who engaged in extensive advertising in the news media with the object of attracting prospective purchasers and customers to his establishment and thereby increasing his sales and profit. We find a business enterprise so conducted is

a matter of public concern and interest. Applying the principles of *Mashburn* to the case at hand, we find the Special Bulletin in question was privileged as 'fair comment' and that Economy's claim for damages for defamation must be rejected."
(Petitioner's Appendix - P. 95-96).

Rather than considering the matter in a cursory way and applying common-law malice, as contended by Petitioner, the First Circuit considered the issue in light of this Court's "knowing or reckless disregard of the truth" test as evidenced by the following:

"Were the expressions in the bulletin malicious, meaning were they knowingly false or made with reckless disregard as to their truth or falsity? The burden of proof rests upon Economy in this regard. Admittedly, the burden is onerous. Essentially, Economy attempted to establish that the bulletin was not published to question or challenge Economy's business practices, but was intended to drive Economy out of business because Economy was not a BBB member. We find the record totally devoid of evidence to substantiate this contention. On the contrary, the proof preponderates overwhelmingly in favor of the conclusion that the bulletin was issued solely to make available to BBB members and consumers the information which BBB had developed concerning Economy in order to promote knowledgeable dealing with Economy by prospective' purchases of carpeting. This finding of fact does not require our finding manifest jury error herein. In instructing the jury, the trial judge did not have the benefit of *Mashburn* and the jury was not instructed in the light of *Mashburn's* interpretation of the 'fair comment' privilege afforded by the First Amendment of the United States Constitution. On the contrary, the interrogatories presented the jury included one that requested a finding of whether or not BBB was at 'fault.'"
(Petitioner's Appendix - P. 93-95).

Nor can Professor David W. Robertson (one of the authors of plaintiff's Petition herein) argue with the soundness of the Louisiana Court's approach to the instant case. In his Article entitled "Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.", 54 Texas Law Review 199, at Page 226 he states:

"When a corporation utilizes advertising, it intentionally influences the public's purchasing decisions and arguably becomes a public figure under the Gertz *voluntary involvement test. The status of the business as a public figure should extend, however, only to matters connected with the advertisements, such as charges of deceiving the public or marketing unsafe products.* The desirability of public figure treatment under the voluntary involvement test turns partly on the need one perceives for greater protection against deceptive advertising and unsafe products. In addition, the need for a stronger media check may arise only when a firm advertises so extensively that the business becomes a household name, in which case recourse to the voluntary involvement test is unnecessary. *Finally, better solutions may exist in administrative agencies, in private bodies such as the Better Business Bureau, or in special rules of law designed for the business context."*
(Emphasis supplied).

III.

EXPRESSIONS OF OPINION ABOUT PUBLIC FIGURES MADE WITHOUT KNOWING OR RECKLESS FALSITY ARE PRIVILEGED UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

In *Mashburn v. Collin*, 355 So.2d 879 (La., 1977), the Louisiana Supreme Court considered at length the decisions of this Court generally referred to as the *New York Times - Gertz* series of cases. The Louisiana Court pointed out with clarity that not only is "truth" a defense to defamation but

that this Court has enunciated a "fair comment" privilege beginning with *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), as expanded by other decisions, including *Gertz v. Robert Welch, Inc.*, supra. The Louisiana Supreme Court said:

> "We conclude, therefore, that the First Amendment freedoms as defined by the New York Times - Gertz series of decisions afford, at the very least, a defense against defamation actions for expressions of opinion about matters of public concern made without knowing or reckless falsity." (355 So.2d 899, 885).

Nor was the Louisiana Supreme Court content to leave the matter there. The Court went on to distinguish between statements of fact and opinion:

> "The distinction drawn between opinion and statement of fact has long been important at common law because most states restricted the privilege of fair comment to expressions of opinion. Although difficult to state in abstract terms, as a practical matter, the crucial difference between statement of fact and opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact. The opinion may be ostensibly in the form of a factual statement if it is clear from the context that the maker did not intend to assert another objective fact but only his personal comment on the facts which he had stated. An expression of opinion occurs when the maker of the comment states the facts on which his opinion of the plaintiff is based and then expresses a comment as to the plaintiff's conduct, qualifications or character, or when both parties to the communication know the facts or assume their existence and the comment is clearly based on the known or assumed facts in order to justify the comment. Criticism is privileged as fair comment only when

> the facts on which it is based are truly stated or privileged or otherwise known either because the facts are common knowledge or readily accessible." (355 So.2d 879, 885).

Applying the above to the Special Bulletin, the Court of Appeal, First Circuit, concluded as a fact that the statements in the Bulletin were true, were not made with knowing or reckless falsity and were entitled to the First Amendment privilege of "fair comment."

Although involving a political candidate, *Sprouse v. Clay Communications, Inc.*, _____ W.Va. _____, 211 S.E.2d 674, Certiorari Denied by this Court at 423 U.S. 882, 96 S.Ct. 145, 46 L.Ed.2d 107 (1975) contains a statement which seems particularly appropriate here:

> "Had the *Charleston Daily Mail* confined itself to reporting the facts of the Pendleton County land transactions in temperate terms, and, had it stated that further investigation might prove this transaction suspect, the *Mail* would have been protected under the First Amendment."

What the Supreme Court of West Virginia says should have been done by the press is exactly what the BBB did in the present case.

IV.

THE TIMES - GERTZ PRIVILEGES ARE NOT RESTRICTED TO CORPORATIONS IN THE BUSINESS OF COMMUNICATINS AND ARE BASED, AT LEAST IN PART, ON THE FIRST AMENDMENT'S PROTECTION OF PUBLIC DISCUSSION AND THE DISSEMINATION OF INFORMATION AND IDEAS.

Petitioner begins its argument on restricting the Times - Gertz privileges to media businesses by "acknowledging the

continuing controversy over whether the *Gertz* decision was intended to be restricted to defamation by the press and broadcast media." Page 47.

This Court seems to have laid this argument to rest in its decision in the recent case of *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978):

> "The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate. *Mills v. Alabama*, 384 U.S., at 219, 86 S.Ct., at 1437; see *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863-94 S.Ct. 2811, 2821-2822, 41 L.Ed.2d 514 (1974) (Powell, J., dissenting). **But the press does not have a monopoly on either the First Amendment or the ability to enlighten.** Cf. *Buckley v. Valeo*, 424 U.S. 1, 51 n.56, 96 S.Ct. 612, 650, 46 L.Ed.2d 659 (1976); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-390, 89 S.Ct. 1794, 1806-1807, 23 L.Ed.2d 371 (1969); *New York Times Co. v. Sullivan*, supra, 376 U.S., at 266, 84 S.Ct., at 718; *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945). Similarly, the Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas. See *Red Lion Broadcasting Co. v. FCC*, supra; *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed. 542 (1969); *Time, Inc. v. Hill*, supra, 385 U.S., at 389, 87 S.Ct., at 542. Even decisions seemingly based exclusively on the individual's right to express himself acknowledge that the expression may contribute to society's edification. *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948)." (Emphasis supplied).

Chief Justice Burger in his concurring opinion concludes:

> "In short, the First Amendment does not 'belong' to any definable category of persons or entities: it belongs to all who exercise its freedoms."

The concern expressed in dissenting opinions of the other Justices should be allayed by the following from the decision of the Louisiana Court of Appeal, First Circuit, in the present case, at Page 236:

> "BBB is a voluntary non-profit corporation with a membership of merchants, business men, professionals, tradesmen, industries and individuals and concerns fuurnishing personal services to the public. It is essentially a consumer information service. Although there are such bureaus in cities throughout the nation, each bureau is a separate entity chartered by local business interests. BBB has a membership of approximately 1300 individuals and concerns. It operates on an annual budget of approximately $160,000.00 provided by fees ranging from an annual minimum of $100.00 for individuals and small concerns to a graduated maximum of several times that amount for corporations, depending upon the number of corporate employees. It has a President, Vice President and an office staff of five employees consisting of secretaries, stenographers and file clerks. The objectives of BBB are to: (1) promote and assist in maintaining truth, honesty and accuracy in business selling practices and increase and justify public confidence in the printed and spoken word of business; (2) advocate and assist in maintaining fair competition in business; (3) inform and educate the public to the difference between honest and legitimate advertising and selling and that which is dishonest and improper, and by all proper means prevent the public

from being misled and taken advantage of by unfair advertising practices; (4) cooperate with other such organizations having the same objectives; (5) cooperate with and assist duly constituted authorities in matters involved in accomplishing the above objectives; and (6) do all necessary to carry out the purposes of the organization." (Petitioner's Appendix - P. 70-72).

In this context, the BBB did no more than it was legally chartered to do by the State of Louisiana.

CONCLUSION

The Supreme Court of Louisiana and the Louisiana Court of Appeal, First Circuit, has followed the holdings of this Court in the *New York Times - Gertz* series of cases.

After making factual conclusions, the appellate courts have determined, in the present case, that the publication concerning Petitioner was truthful and consisted of opinions entitled to the protection of the First Amendment to the Constitution.

The Petition for Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE

I, HORACE C. LANE, one of the attorneys for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on 18th day of January, 1979, I served three copies of the Opposing Brief to Petition for Writ of Certiorari on Petitioner by mailing the same, through the United States Mail, to counsel of record for Economy Carpets Manufacturers and Distributors, Inc., D. Bert Garraway, Esquire, 1851 Plank Road, Baton Rouge, Louisiana 70805; Bart Eaton, Esquire, 911 N. Lobdell Boulevard, Suite C, Baton Rouge, Louisiana 70806, and to David W. Robertson, Esquire, 2500 Red River, Austin, Texas 78705, first class, postage prepaid. I further certify that all parties required to be served have been served.

January 18, 1979.

Horace C. Lane

HORACE C. LANE